SUPREME COURT, U. S.

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No. 255

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES, *Petitioner*

v.

U.S. THERMO CONTROL CO. and

THERMO KING CORPORATION, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Where Congress has consistently treated refrigeration equipment and automotive equipment as separate objects for imposition of the manufacturers excise tax, was it error for the court below to conclude that repeal of the tax on commercial refrigeration, without reservation or exception, meant that refrigerating systems used with trucks and trailers were not to be taxed as automotive parts or accessories?

STATEMENT

In 1932 Congress imposed manufacturers excise taxes upon automotive equipment and upon refrigeration equipment. The former applied to automotive vehicles including trucks and to parts and accessories as well; the rate was 2 per cent. 47 Stat. 261-62.[1] In 1941 this tax was broadened to include trailers and truck-trailers and their parts and accessories; the rate was increased to 5 per cent. 55 Stat. 711.

The tax on refrigeration when first imposed in 1932 was limited to household refrigerators and components and did not extend to commercial refrigeration equipment; the applicable rate was 5 per cent. 47 Stat. 263, 264. In 1941 this tax was extended to commercial refrigeration of all kinds, and the rate was increased to 10 per cent. 55 Stat. 713. In 1942 Congress eliminated the tax on commercial refrigeration and returned to the pattern of 1932, taxing household refrigerators only. 56 Stat. 978.

Respondent began in 1938 to manufacture refrigerating systems for use with all kinds of transportation equipment.[2] Such systems are self-contained and provide complete cooling for trucks, trailers, trains and ships; they are made, sold and serviced by a separate industry, entirely apart from companies engaged in manufacturing or servicing transportation equipment. (Pltf. Ex. pp. 5-6, 9, 19).

Respondent paid no excise tax on its refrigerating systems until 1941. So long as the tax on commercial

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[1] An earlier excise tax on automotive vehicles had been repealed in 1928.

[2] All firms in the line of succession of the present Thermo King Corporation are referred to in this brief collectively as "respondent."

refrigeration, enacted in 1941, remained in effect respondent paid a tax at the 10 per cent rate on its entire production. After the tax on commercial refrigeration was repealed, the Commissioner of Internal Revenue asserted that those systems manufactured by respondent that were used on trucks and trailers were subject to tax as automotive "parts or accessories." (Pltf. Ex. p. 14). This action was brought to recover taxes paid by respondent in subsequent years pursuant to the direction of the Internal Revenue Service.

The court below held upon analysis of the relevant statutes and administrative rulings that, in view of the consistent action of Congress in treating automotive and refrigeration equipment as separate objects of excise taxation, the effect of the repeal of the tax on commercial refrigeration was to relieve all such equipment from tax rather than to subject some systems to tax under the catch-all "automotive parts and accessories." The first decision of the court below in respondent's favor is reported at 354 F.2d 242 (1965), and the second is in Appendix A to the petition.

STATUTES AND RULING

There are set out in the Appendix (1) the relevant portions of the statutes that imposed an excise tax on household refrigeration in 1932, extended the tax to commercial refrigeration in 1941 and repealed the commercial refrigeration tax in 1942, and (2) Revenue Ruling 63-23, the most recent and comprehensive listing by the Internal Revenue Service of categories of articles taxable as automotive parts or accessories, which does not include mechanical refrigeration systems.

REASONS FOR DENYING THE WRIT

The decision below resolves a narrow question of statutory construction concerning the excise tax treatment of refrigerating systems used in trucks and trailers. Neither in result nor in rationale does it raise any general questions as to the scope and interpretation of the excise tax statutes. It is not, and is not claimed to be, in conflict with any decision of this Court or any other court, and such effect as it may have upon the revenue is not great and is subject to the overriding will of Congress. Moreover, the decision is a plainly correct application of the principle expounded by this Court in *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956): that, in the absence of an indication of congressional intention to the contrary, repeal of a statutory provision specifically subjecting an article to tax terminates the taxability of that article even though there remains in effect a more general taxing provision to which the article might otherwise be arguably subject. There is no warrant for review by this Court.

1. The court below found that the pattern of congressional action taxing commercial refrigeration equipment used in transportation was this: Between 1932 and 1941 refrigeration systems for trucks and trailers were not subject to any excise tax. The tax on refrigerators was limited to household refrigerators, and the automotive parts and accessories tax did not reach commercial refrigeration units. In 1941 an excise tax was imposed on commercial refrigerating equipment, including equipment used with trucks and trailers. That tax was repealed in 1942, and the automotive parts and accessories tax was not changed in any relevant respect. Applying this Court's decision in *United*

States v. *Leslie Salt Co.*, *supra*, to this pattern of congressional action, the court below held that truck and trailer refrigerating systems were relieved from taxation by the repeal of the taxing provision specifically applicable to them and, in the absence of any expression by Congress, were not caught up in the more general parts and accessories provision.[3]

The concern of the court below was entirely with the statutory provisions to which we have referred, and with them only to the extent that they dealt with the taxability of commercial transportation refrigerating systems. The considerations underlying the answer to the question with which the court was confronted were intricate, as can be seen from its two opinions. Analysis of Internal Revenue Service rulings and legislative history as well as the language of several versions of the relevant statutory provisions was called for. But the decision based on that analysis has no application to other excise tax problems, even other problems arising under the automotive parts and accessories tax provision. This was demonstrated by a recent decision of the court below concerning the applicability of the parts and accessories tax to auto-

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[3] In *Leslie Salt*, following the elimination of the excise tax on "promissory notes" this Court refused to permit the Commissioner to tax certain instruments as "certificates of indebtedness" under a provision that remained in effect after repeal of the tax on promissory notes. As an initial matter, the instruments in question could readily have been comprehended within the phrase "certificates of indebtedness," but they clearly were promissory notes, and the Court considered itself obliged to give effect to Congress' decision to repeal the tax on promissory notes. Here effect is given to the decision to repeal the tax on commercial refrigeration only if respondent's units are freed from tax and not subjected as an afterthought to another tax that survived repeal of the commercial refrigeration tax.

mobile radio antennas. There the court, ruling in favor of the Government, made clear that the decision in this case rests solely upon the special circumstances presented by the actions of Congress relating to the excise tax on refrigeration equipment. *Van Norman Industries, Inc.* v. *United States,* 361 F.2d 992 (1966), *cert. denied,* 386 U.S. 981 (1967).

Certainly, therefore, there is no substance to the contention of the Government that the court below took a novel approach to the problem it faced, characterized variously as finding an "implied exemption" from excise taxation or a repeal by implication (Pet. pp. 2, 5, 13, 14), that "is likely to lead to extensive litigation with regard to the scope and interpretation of other excise taxes." (*Id.* p. 6). There is no exemption or repeal by implication in this case. What is involved rather is the express repeal of the statutory provision specifically taxing an article and the consequence of such a repeal so far as possible continued taxability of the article under another previously inapplicable provision is concerned.[4] The principle of decision in such cases was laid down by this Court in *United States* v. *Leslie Salt Co., supra.* So far as we are aware, that decision has not produced extensive litigation.

The only other reason assigned by the Government for presenting the question here as one warranting review by this Court is its assertion that the decision, if allowed to stand, will result in the loss to the Government of something like $5 million a year in excise taxes.

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[4] "This does not, then, appear to be the kind of problem created by the repeal of a tax on an article and the possible application of another, more general, tax that we recently faced in Thermo King Corp. v. United States . . . ." Van Norman Industries, Inc. v. United States, *supra* at 997.

To make this loss sound more impressive the Government projects it over a ten-year period ending in 1972. (Pet. pp. 4, 5 and n.5). But before any revenue loss of such magnitude can occur Congress will have had ample opportunity to amend the statute and thereby to express its dissatisfaction with the decision below if it believes that by that decision its will has been contravened. *Cf.* Excise Tax Reduction Act of 1965, 79 Stat. 136.

2. The court below was plainly correct in finding the pattern of congressional action that it did find and on that basis invoking the principle of the *Leslie Salt* case as a guide to its decision here.

(a) There is no doubt that Congress in 1932 originally elected to limit the tax on refrigeration equipment to household equipment, in 1941 decided to extend it to commercial refrigeration including equipment of the type manufactured by respondent, and in 1942 reconsidered and returned to a tax limited to household refrigerators. (App. pp. 1a-2a).

The 1932 Act, by its terms, was limited to "household type" refrigerators. And the Commissioner, contemporaneously with that enactment, ruled unequivocally that units "designed primarily and solely used for commercial purposes are exempt from tax." S.T. 523, XI-2 Cum. Bull. 477 (1932). In 1941 the intention of Congress to tax all kinds of commercial refrigeration was as plainly manifested as its intention in 1932 to exempt such equipment from tax. The report of the Ways and Means Committee states:

> Under existing law the tax on mechanical refrigerators applies only to those of the household type and components and parts thereof. *Under the bill this tax will apply to all mechanical*

refrigerators and refrigerating units whether of household or other type. (Emphasis supplied.) H.R. Rep. No. 1040, 77th Cong., 1st Sess. 32 (1941). See also *id.* at 55; S. Rep. No. 673, 77th Cong., 1st Sess., Pt. I at 49 (1941).

The view of these enactments that the petition takes depends essentially upon acceptance of the proposition that, when Congress dealt with commercial refrigeration, deciding whether to tax it or not, it intended in each instance to exclude from consideration equipment that could be used with automotive vehicles. According to the petition, Congress exercised its power to tax such equipment in 1932 when it imposed a tax on automotive parts and accessories and thereafter never had such equipment in mind when it legislated with respect to commercial refrigeration. (Pet. p. 8). There is no evidence that this was the intention of Congress and considerable evidence that, whenever Congress wished to classify as an automotive accessory an article having independent tax significance, it made its intention explicit.

That evidence is in the Revenue Act of 1941, the Act that added commercial refrigeration and other products to the excise tax rolls and raised rates on yet other articles to produce additional revenues to meet defense needs. Where Congress recognized that to some extent certain products to be taxed for the first time or at increased rates were already taxed as automotive accessories, it resolved all possible conflict. To the extent that light bulbs, newly added to the excise tax rolls, were put to automotive use they were to continue to be taxed as accessories, 55 Stat. 717; see H.R. Rep. No. 1203, 77th Cong., 1st Sess. 16 (1941); car radios,

ruled administratively to be accessories, were to be taxable as radios at 10 per cent and not as accessories at 5 per cent, 55 Stat. 712, 713; H.R. Rep. No. 1040, 77th Cong., 1st Sess. 32 (1941); and fare registers and boxes, newly subject to taxation by name, were to be taxed as business machines, not as automotive accessories, 55 Stat. 717; S. Rep. No. 673, 77th Cong., 1st Sess., Pt. I at 52 (1941).

Congress' failure to deal with commercial refrigeration in the way in which it dealt with other accessories provides convincing evidence that it acted in the belief that all commercial refrigeration, including truck and trailer refrigeration, was free of tax by virtue of its 1932 action and would become subject to tax only by virtue of its 1941 action. Similarly, when Congress in 1942 abandoned the tax on commercial refrigeration, its failure to state that certain types of such equipment would become taxable as an automotive accessory is persuasive evidence that such a result was not intended.

(b) Support for the view that refrigerating systems used in trucks and trailers are properly taxable as automotive parts or accessories and not as commercial refrigerating equipment is found only in selected private rulings issued by the Internal Revenue Service. Since these utterances have never been brought to the attention of Congress, and the issue here is solely one of ascertaining the intention of Congress, they are irrelevant. That, indeed, was the view of the Government when the issue was first presented to the court below. It was only after a decision in respondent's favor that the Internal Revenue Service dug into its files and found some correspondence in which it had asserted that some types of refrigeration useful

in automotive vehicles were taxable as accessories.[5] Had the Service made those views known to the Congress in either 1941 or 1942 the question raised in this case might well be in a different posture. Having decided to keep its views to itself—as it originally did in the court below—the Service can hardly, in good conscience, ask that it now be assumed that Congress not only knew of, but actually adopted, those views.

When Congress first imposed an excise tax on refrigeration equipment in 1932, extended it to commercial equipment in 1941 and subsequently repealed the latter action in 1942, there was no evidence presented to it, or publicly available, that the Revenue Service was of the view that "commercial refrigeration" excluded systems used on automotive vehicles. Indeed, the only relevant public statement of position by the Service clearly pointed in the opposite direction. In acknowledging, as noted above, that commercial refrigeration was exempt under the 1932 Act, the Service included among the exempt items "refrigerating units for commercial transportation equipment." S.T. 523, XI-2 Cum. Bull. 477 (1932). What it meant to say, the Government now urges, was that such units were nonetheless taxable as automotive accessories. Perhaps this is not the only occasion on which the Service has publicly announced, without qualification, that a product was "exempt from tax" when, in fact, it was of the view that the item was subject to tax under another section of the same Revenue Act under

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[5] It was the Government's decision to put the issue to the court below without the benefit of this correspondence that accounts for what it now calls "the unsatisfactory state of the record" in the first case. (Pet. p. 3).

consideration. It must however be an exceedingly rare example.[6]

Quite apart from this "ambiguity" in its only published ruling and its failure to inform Congress of the truncated meaning it attached to the term "commercial refrigeration," the record of the Service in applying the automotive accessories tax to refrigerating systems has been neither so consistent nor so long-standing as the petition suggests.[7] Respondent did not pay, and the Service made no contemporaneous effort to collect, the automotive accessories tax in the period before 1941. Moreover, the Service collected and kept the tax respondent paid under the commercial refrigeration tax in 1941-42 at the 10 per cent rate. (Pltf. Ex. p. 49). It was long after that tax had been repealed that Service representatives discovered the accessories tax, and even then they took no action to return the overpayment that was due respondent.[8]

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[6] Substantially contemporaneously, the Service ruled that automobile radios, while not taxable under Section 607 of the 1932 Act as "receivers," were taxable under Section 606 of the same Act as automotive accessories. S.T. 643, XII-1 Cum. Bull. 397 (1933).

[7] Even the rulings selected for submission to the Court do not show the consistency claimed by the petition. (Pet. p. 9). As the court below observed, "we are by no means persuaded that these rulings evidence the consistency of Bureau interpretation ascribed by the affidavit of Branch Chief Fischgrund." (Pet. p. 20).

[8] The suggestion that respondent's failure to produce consents from its customers justified the action of the Service is completely without merit. (Pet. p. 12). The Service has long recognized that such consents may be, and ordinarily are, produced after the right to a refund has been established. Rev. Rul. 58-563, 1958-2 Cum. Bull. 892, 893.

The Treasury Regulations defining automotive parts and accessories are unusually detailed and specific in listing examples of articles comprehended thereunder. (Pet. p. 27). While they include purses for carrying parking meter coins that sell for a few cents, they unaccountably fail to mention refrigerating systems that sell for thousands of dollars.[9] Even when the Service, "in order to provide guidance" in response to "numerous inquiries," undertook as late as 1963 to amplify and supplement the list of parts and accessories found in the Regulations, it again unaccountably failed to recognize mechanical refrigerating systems. (See Appendix pp. 3a-10a). Some fifty-five distinct categories of items were listed, but no mention was made of refrigerating systems of the kind manufactured by respondent and others. It was not until after the publication of that comprehensive list and after the commencement of this litigation that the Service for the first time publicly ruled that such systems were automotive parts or accessories. Rev. Rul. 63-160, 1963-2 Cum. Bull. 489.

Thus, on the public record the decision of the court below that commercial refrigeration had been treated by Congress as a subject of taxation separate from automotive parts and accessories is clearly right, and the private materials belatedly advanced by the Government do not impinge upon its correctness. In no sense do they reflect on the conclusion that Congress elected to treat all refrigeration equipment as a discrete object of excise taxation, rather than leaving some portion of it for treatment under the automotive catch-all that encompasses auxiliary items such as ashtrays, baby seats and tool kits. (See Pet. pp. 27-28).

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[9] As the petition notes, the tax alone on the seven units involved in the first decision in respondent's favor totaled some $1,500. (Pet. pp. 2-3).

CONCLUSION

The decision of the court below, which faithfully applies the relevant decisions of this Court and is in conflict with no decision, is a just and rational resolution of a narrow question of statutory construction that raises no significant question in the administration of the tax laws. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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